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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

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No. **77-1447**

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**RETAIL STORE EMPLOYEES UNION, LOCAL 876,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Petitioner,**

v.

**NATIONAL LABOR RELATIONS BOARD,
Respondent.**

—•—
**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

—•—
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Petitioner, Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-CIO, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on January 11, 1978.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Opinion of the National Labor Relations Board and its Administrative Law Judge also appear in the Appendix hereto and are reported at 219 NLRB No. 187.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on January 11, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Section 8(a) (4) of the National Labor Relations Act (like similar provisions of other Federal statutes) makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." Does an employer violate the section by allegedly discharging an unsubpoenaed employee for *refusing* to give such testimony?

The NLRB held, yes, and the Sixth Circuit affirmed.

Petitioner submits that the answer is, no.

STATUTORY PROVISIONS INVOLVED

"(a) It shall be an unfair labor practice for an employer —

* * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter* * *." 29 USC §158(a) (4).

STATEMENT OF THE CASE

Petitioner, *qua* employer, was charged and found guilty by the National Labor Relations Board of violating Section 8(a) (4) of the National Labor Relations Act, as amended, because it discharged an employee, Anna Pennacchini, allegedly in retaliation for her refusal to testify in a prior NLRB proceeding to which she had not been subpoenaed. The Sixth Circuit affirmed.

It was undisputed both by the Board and by the Sixth Circuit, in affirmance, that employee Pennacchini had neither previously filed unfair practice charges, nor given testimony to the Board, nor (unlike *NLRB v Scrivener*, 405 US 117 (1972)) given any pre-hearing statement to any agent of the Board.

The Board's Administrative Law Judge had found respondent guilty of Section 8(a) (4) (and derivatively,

Section 8(a) (1))¹ violations of the Act on the exclusive basis that "she refused to appear voluntarily as a witness in the unfair labor practice proceeding involving a former fellow employee, on the ground that she had no direct knowledge of the matters about which she was to be questioned; her presence at the hearing, moreover, was not sought to be compelled by subpoena. In these circumstances, I conclude that her right not to appear was protected by the Act." No authorities were cited.

From these and other findings and conclusions, respondent timely excepted to the NLRB.

On April 18, 1975, the Board affirmed, 219 NLRB No. 187. It expressly agreed with the ALJ's central finding, above quoted, although not citing the absence of a subpoena as material. The Board continued that, "we find no merit in the Respondent's contention that she was not requested to testify, because such an assertion is contrary to her credited testimony." The Board further found that the letter of termination cited Pennacchini's "forget[fulness]" of her prior accounts of the other employees' activities and thus respondent fired Pennacchini "for lack of cooperation." The Board held that that violated Sections 8(a) (4) and (1) of the Act. The Board cited no direct authorities, except to conclude that the protection of the Act given to an

¹ "(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; * * * 29 USC §158(a) (1).

employee who in fact testifies in behalf of a fellow employee in an NLRB proceeding "extends to an employee who, without malice, refuses to give testimony, voluntarily, against a fellow employee."

The Board did not find that respondent sought to foster untrue testimony, nor that Pennacchini's assessment of the competence of her testimony was valid. As to the latter, the Board said:

"Pennacchini may have been wrong in her assessment of the value of her testimony and her competence as a witness. Although her unsigned, unsworn statement, taken by the Respondent in April, tends to support her assertion in this regard, we need not decide that issue. On the other hand, we cannot say she acted with malice. In any event, as the Administrative Law Judge noted, the Respondent could have lawfully tested this assessment and compelled the testimony of this reluctant witness, but failed to do so. Instead, as an act of reprisal the Respondent discharged her for lack of cooperation."

On such findings the Board affirmed its Administrative Law Judge and ordered a reinstatement and back pay remedy.

The Sixth Circuit affirmed — exclusively on the §8(a) (4) ground; it declined to reach the §8(a) (1) ground on which this Court had declined to intimate its views in *NLRB v Scrivener*, 405 US 117, 125 (1972).

REASONS FOR GRANTING THE WRIT

THE CASE PRESENTS QUESTIONS OF MAJOR STATUTORY SIGNIFICANCE; AND THE DECISION BELOW IS PLAINLY CONTRARY TO THE PROVISIONS OF THE ACT AND THIS COURT'S DECISION IN NLRB v SCRIVENER, 405 US 117 (1972).

The statutory provision in question, §8(a) (4), 29 USC §158(a) (4),² is a provision common to several statutes dealing with regulatory agencies. See, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 USC §2000e-3³; Fair Labor Standards Act, 29 USC §215(3)⁴;

² "(a) It shall be an unfair labor practice for an employer —

* * "(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act."

³ "(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

⁴ "(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;"

Occupational Safety and Health Act of 1970, 29 USC §660(c) (1)⁵; Water Pollution Prevention and Control Act, 33 USC §1367(a)⁶; Federal Coal Mine Health and Safety Act of 1969, 30 USC §280(b) (1)⁷; and Age Discrimination in Employment Act, 29 USC §623(d)⁸. In

⁵ "(c) (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter."

⁶ "(a) No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."

⁷ "(b) (1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."

⁸ "(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."

granting review in *NLRB v Scrivener*, 405 US 117 (1972), the Court stated that, "We granted certiorari in order to review a decision that appeared to have an important impact upon the administration of the Act."

The present case involves an unprecedented construction and application of the Section, and is moreover one which violates the letter and spirit of *Scrivener*.

In the instant case, it was neither alleged nor found that in connection with any former Board proceeding the employee had filed charges, testified, given statements to the Board, or even threatened to do any of these things, or an account of any of the foregoing had suffered any discriminatory treatment.

Ironically, the Section 8(a) (4) violation was found by the Board and affirmed by the Sixth Circuit because of the *opposite* — namely, that the employer assertedly sought to have the employee *participate* in a former Board proceeding and that she had assertedly *refused* to do so. Moreover, despite its rationale below, the Board neither decided that the Employer had proposed either false or incompetent testimony nor that the employee was correct in avowedly concluding that she could not competently testify in the former case. Rather, the Board's decision, assuming the question, was that Section 8(a) (4) protected an employee's refusal to participate in a Board proceeding because, right or wrong, the employee was "without malice in supposing her own testimony to be incompetent in the prior case and that the Act, which protects employees who give testimony in an unfair labor practice proceeding "also extends to an employee who, without malice, refuses to give testimony, voluntarily, against a fellow employee."

The ineluctable effect of the Board's decision is that an employer cannot direct its own employee to come to an NLRB trial on working time to give testimony merely because the employee has a notion, however ill founded, that his testimony, if requested, would not likely be significant or competent.⁹

Such conclusion, that an alleged *refusal* to testify is a violation of Section 8(a) (4), is unprecedented in the Act's history is not supported by the language of the Section, and is contrary to the statutory purpose as enunciated by this Court in *Scrivener, supra*.

In *Scrivener*, the Court found an 8(a) (4) violation where employees were discharged because they had in fact given statements to an NLRB field examiner during the course of a prior pre-hearing administrative investigation. The Court concluded that Section 8(a) (4) reached not only literal violations of that section respecting the actual filing of charges or "giving testimony," but also covered the giving of pre-trial statements to Board agents. The rationale asserted by the Court was that such communications to the Board are appropriately subsumed within the concept of giving testimony, consistent with the legislative history of the Section and its purpose; namely, to keep "channels of information" open to the Board.

⁹ There is nothing in Section 8(a) (4) which supports that conclusion and, additionally, never has a determination of discriminatory discharge under Section 8(a) (4) ever previously turned on the state of mind of the alleged discriminatee. Surely an employer should not be required to act at its peril depending upon the state of mind of its employee. And if employee lack of "malice" excuses a discharge for refusal to testify, the employer should be equally privileged to act in the event of an unreasonable employee "refusal" to testify — as where in the judgment of respondent's counsel, as here, an employee's testimony would have been material, relevant and competent in the former proceedings had she been called.

But unless *employers* are to be denied equal access in "channeling information" to the Board, the Board's present theory — that an employer's alleged imposition of discipline for an employee's refusal to testify is the equivalent of such discipline for an employee actually testifying — turns Section 8(a) (4) on its head and undermines the rationale of *Scrivener*. For, instead of effectuating the purpose of the subsection to encourage or protect access to the Board and to keep open to it "channels of information," the present ruling of the Board and of the Sixth Circuit is one calculated to discourage such access to the Board — at least by employers through their potential witnesses — and to reward employee refusals to give information to the Board.

The Board and the Sixth Circuit, however, reasoned that a employer suffers no prejudice by the Board's holding because, if need be, the employer can subpoena its reluctant [and insubordinate] employee to testify. But, if an employee's testimony can, in fact, be compelled by the employer, the degree of compulsion used by the employer does not change the character of what is involved and make it more acceptable to use the greater compulsion of a subpoena.

In fact, *Scrivener* — at the Board's urging — rejected precisely the subpoena, no-subpoena distinction which the Board and the Sixth Circuit have here adopted, 405 US 117, 124. The Court in *Scrivener* expressly concluded that Section 8(a) (4)'s protection could not be dependent on the happenstance of whether a prospective witness had been subpoenaed and that an unsubpoenaed "witness" enjoyed at least the same protection [and we would submit the same obligations] as a subpoenaed one.¹⁰ On the other hand, nothing in *Scrivener*, nor the prior decisions of the Board, accords an unsubpoenaed "witness" fewer employment obligations, unless Section 8(a) (4) is to be read as denying employers the

¹⁰ "The Board's subpoena power also supports this interpretation. Section 11 of the Act, 29 USC §161, gives the Board this power for 'the purpose of all hearings and investigations.' Once an employee has been subpoenaed he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified. Judge Lumbard pertinently described it: 'It is, we think, a permissible inference that Congress intended the protection to be as broad as the [subpoena] power.' *Pedersen v NLRB*, 234 F2d 417, 420 (CA 2 1956).

"Under this reasoning, if employees of *Scrivener* had been subpoenaed, they would have been protected. There is no basis for denying similar protection to the voluntary participant." 405 US 117, 124.

right to instruct employees to appear at a Board hearing during their working hours and, if present at that hearing, to testify if called as a witness.¹¹

In short, neither the language nor the history, nor the purpose, nor the spirit of Section 8(a) (4) gives any basis for this unprecedented and erroneous ruling.

Because of the important statutory issue involved here, which affects numerous federal agencies, and the employers and employees of the nation, the writ should be granted, and the decision below should be reversed.

¹¹ There are speculative intimations in the Sixth Circuit's decision, as distinguished from the Board's own decision, that the testimony of a subpoenaed employee is likely to be more reliable than of an employee who merely testifies at the request of her employer.

The Sixth Circuit, hypothesizing facts not found by the Board itself, said:

"Although Pennacchini was not prevented from reporting information to the Board, the coercion applied against her had a direct bearing on a pending Board proceeding. Had she acquiesced in her employer's request that she testify against Frazier, she could very well have perjured herself before the Board. The result would have been more serious than a closing of 'channels of information' to the Board. It would have been the outright misleading of the Board. Coercing employees to give untrue testimony just as surely undermines the integrity of the Board proceedings as does coercing employees to give no testimony at all."

Apart from the irrelevance of that proposition to the statutory section sued upon, and to the Board's own findings below, there is certainly no justification for that conclusion; the employee if called as a witness is required in either event to take the same testimonial oath of probity, and is subject to the same liability for perjury. Furthermore, in either case, any improper testimony by the employee would be subject to the same exclusionary rules of evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Sixth Circuit.

Respectfully submitted,

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DATED: April 3, 1978.

APPENDIX

DECISION

UNITED STATES COURT OF APPEALS — SIXTH CIRCUIT

(N.L.R.B. v Retail Store Employees Union
Local 876, et al. — No. 76-1004)

(Decided and Filed January 11, 1978)

Before: CELEBREZZE, ENGEL, Circuit Judges, and
WALINSKI,* District Judge.

CELEBREZZE, Circuit Judge. The National Labor Relations Board seeks enforcement of its order that Retail Store Employees Union Local 876 reinstate a former employee, Anna Pennacchini, with back pay. The Board found in an unfair labor practice proceeding that the union *qua* employer had violated §8(a) (4) of the National Labor Relations Act ("the Act") by firing Pennacchini in retaliation for her refusal to testify voluntarily for the union in an earlier unfair labor practice proceeding.¹ 219 NLRB 1188 (1975). Section 8(a) (4) states that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" in an NLRB proceeding. The union petitions for reversal of the Board order on the grounds,

* The Honorable Nicholas J. Walinski, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

¹ The Board also found that Pennacchini's discharge violated §8(a) (1) of the Act, which makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of this Act." Because of our disposition of the §8(a) (4) charge, we need not review the Board's finding with respect to §8(a) (1). See *NLRB v. Scrivener*, 405 U.S. 117, 125 (1972).

inter alia, that the Board's findings are not supported by substantial evidence, that §8(a) (4) does not protect employees who have refused to offer testimony, that Pennacchini was a "managerial" employee not protected by the Act, and that the reinstatement order constituted an abuse of discretion.

The principal factual dispute before the Board was whether Anna Pennacchini's discharge had been motivated, at least in part, by her refusal to testify for her employer in an unfair labor practice proceeding involving a former fellow employee, Barbara Frazier. Frazier was discharged by the union in October 1972, and immediately initiated proceedings against the union, alleging that her discharge was violative of the Act. According to Pennacchini,² union president Horace Brown told her on several occasions in early 1973 that she was expected to testify at Frazier's hearing, and he also directed Pennacchini to prepare a list of alleged improprieties committed by Frazier, based on rumors that he (Brown) had heard. Pennacchini further maintains that on the day before the Frazier hearing, she was asked by the union's attorney if she was prepared to testify at the hearing to substantiate the allegations in the list she had prepared for Brown. Her response was that she had "never personally observed any" of the misconduct alleged in the list, and that she knew that the attorney "would not want [her] to testify to something [she] did not personally observe."

Pennacchini was not called as a witness by either side at the Frazier hearing, although the union could have subpoenaed her testimony under §11(1) of the Act.

² Pennacchini testified at her own unfair labor practice hearing, conducted before an Administrative Law Judge. 219 NLRB at 1190-91.

Approximately one month later, Brown fired Pennacchini in a termination letter that accused her of "extraordinary disloyalty" and of "conveniently" forgetting certain facts that tended to incriminate Frazier.³

³ Dear Mrs. Pennacchini:

This is to notify you of your termination of employment with Local 876, effective immediately.

I am terminating your department and position, effective immediately, to complete the phase-out which began many months ago.

Quite frankly, I would have taken this action sooner but I was determined to avoid any incident which might be claimed to prejudice the Union elections, just concluded, whose fairness I was determined to assure.

You should also know that even had I not terminated your department and position, as I am doing, I would have found your discharge necessary because of your extraordinary disloyalty and breaches of confidence as an employee.

These include, according to the testimony of Barbara Frazier in her NLRB trial, your reporting to her the conversation between our attorney and yourself, including part of the intended Union defense against Mrs. Frazier's unjustified claim. Not only did you conveniently "forget" those facts which you had previously told me about Mrs. Frazier, which had in part influenced my decision to terminate her, but by communicating to a person suing the Union the confidences of your employer and its attorney in connection with the defense of that matter, you violated every obligation of trust due to your employer.

Secondly, you were plainly responsible for the unauthorized and surreptitious release of the Union's mailing list in connection with a campaign mailing by Ray Soncrant. Quite apart from the malicious content of that document, you violated your obligation to maintain the confidence of that list, which was entrusted to you only for authorized purposes.

(continued on next page)

Shortly after receiving the termination letter, Pennacchini filed an unfair labor practice charge against the union. The Administrative Law Judge concluded that Pennacchini "was an essentially truthful witness," 219 NLRB at 1194. He also concluded that the union had terminated Pennacchini "because she refused to appear voluntarily as a witness in the unfair labor practice proceeding involving a former fellow employee, on the ground that she had no direct knowledge of the matters about which she was to be questioned." *Id.* The Board adopted the findings and conclusions of the Administrative Law Judge, noting that it was "abundantly clear that Pennacchini's discharge was motivated, at least in part, by her refusal to cooperate with the Respondent, . . . when, in the presence of Brown and the Respondent's counsel, she disclaimed firsthand knowledge of Frazier's shortcomings." 219 NLRB at 1188.

(continued from preceding page)

As the chief executive officer of this Union, I would find intolerable disloyalty to the Union and breaches of its confidences by any employee. But for such misconduct to occur by an employee in your sensitive and confidential relationship is inexcusable. The Union obviously cannot be in the position of having its policies and confidences violated by someone whose very job responsibility it is faithfully to execute and protect them.

Although, as chief executive officer, I am constitutionally empowered to discharge you without cause, I point out all of these matters so there will be no false accusations as to the reason for your discharge.

Sincerely,

/s/ Horace Brown
Horace Brown
President

We have carefully reviewed the record, and conclude that the Board's findings of fact are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). According to Pennacchini's credited testimony, she was asked by the union if she would testify in support of certain allegations against Frazier and she refused. The termination letter demonstrates that Pennacchini's conduct with regard to the Frazier hearing was clearly on Brown's mind when he fired her. Based on this evidence, the Board could reasonably conclude that the firing was at least partially motivated by Pennacchini's refusal to testify.

We recognize that Pennacchini's discharge may have been motivated by factors other than her refusal to testify: indeed, the termination letter suggests several possible explanations.⁴ But it is not the job of this Court to conduct a *de novo* consideration of the evidence: we need only find that there was substantial evidence to support the Board's conclusion. Moreover, the Board was not obligated to find that Pennacchini's refusal to testify was the sole motivating factor in her discharge. See *NLRB v. West Side Carpet Cleaning Co.*, 329 F.2d 758, 761 (6th Cir. 1964).

As we read the Board's findings, Pennacchini was fired because she would not testify in support of the union's position at the Frazier unfair labor practice

⁴ The union maintains that Pennacchini was discharged because her position had been eliminated. In view of the failure of the union to fire Pennacchini until several months after her job had ostensibly been eliminated, the Board could well have been skeptical of this explanation.

proceeding. The principal legal issue in this case is whether such a discharge constitutes a violation of §8(a) (4) of the Act. We believe that it does.

Although the specific language of §8(a) (4) refers only to an employee who "has filed charges or given testimony," the Supreme Court has read the statute to protect other employees as well. In *NLRB v. Scrivener*, 405 U.S. 117 (1972), the Court held that §8(a) (4) precludes the discharge of an employee for giving written sworn statements to a Board field examiner. The employee had not "filed charges or given testimony," but the Court felt that Congress had intended to protect employee participation in the investigatory, as well as the hearing stages of Board proceedings.

The Act's reference in §8(a) (4) to an employee who "has filed charges or given testimony," could be read strictly and confined in its reach to formal charges and formal testimony. It can also be read more broadly. On textual analysis alone, the presence of the preceding words "to discharge or otherwise discriminate" reveals, we think, particularly by the word "otherwise," an intent on the part of Congress to afford broad rather than narrow protection to the employee.

id. at 122 (emphasis supplied).

This interpretation was consistent with the purpose of the section, which was to ensure that all persons with information about unfair labor practices "be completely free from coercion against reporting them to the Board." *Id.* at 121, quoting *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). Such "complete freedom" is necessary, said the Court, "to prevent the Board's channels of information from being

dried up by employer intimidation of prospective complainants and witnesses.' " 405 U.S. at 122, quoting *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951).

Similar considerations militate in favor of extending statutory protection to the activity involved in this case. Although Pennacchini was not prevented from reporting information to the Board, the coercion applied against her had a direct bearing on a pending Board proceeding. Had she acquiesced in her employer's request that she testify against Frazier, she could very well have perjured herself before the Board. The result would have been more serious than a closing of "channels of information" to the Board. It would have been the outright misleading of the Board. Coercing employees to give untrue testimony just as surely undermines the integrity of Board proceedings as does coercing employees to give no testimony at all.

The fact that Pennacchini never actually gave testimony or spoke with a Board agent is irrelevant. As the Court pointed out in *Scrivener*, the practicalities of administrative action require that §8(a) (4) protection not be limited to particular, discrete stages of Board proceedings.

An employee who participates in a Board investigation may not be called formally to testify or may be discharged before any hearing at which he could testify. His contribution might be merely cumulative or the case may be settled or dismissed before hearing. Which employees receive statutory protection should not turn on the vagaries of the selection process or on other

events that have no relation to the need for protection. It would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time. This would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the Board process in its entirety.

405 U.S. at 123-24 (emphasis supplied).

We think that the "integrity of the Board process in its entirety" would be seriously undercut if employers were allowed to freely discharge employees who because of lack of knowledge refuse to testify in support of the employer position at an unfair labor practice hearing.⁵ Employees might well feel compelled to offer misleading statements to the Board if they knew they could be fired for showing reticence in coming forward with testimony favorable to the management side. Fair adjudication of disputes requires that witnesses be free from excessive external pressures to manufacture or withhold particular evidence.

⁵ In *Hoover Design Corp. v. NLRB*, 402 F.2d 987 (6th Cir. 1968), this Court ruled that the discharge of an employee for threatening to go to the Board or threatening to file charges with the Board did not constitute a violation of §8(a) (4). Although we are not presented with a case involving "threats" to file charges, we note that *Hoover Design* was decided prior to the Supreme Court's decision in *Scrivener*. To the extent that *Hoover Design* is inconsistent with *Scrivener*, it is obviously no longer binding authority.

The legislative history of §8(a) (4) supports application of the statute in this case. In the Senate debates on the Wagner Act, of which §8(a) (4) was a part, Senator Wagner gave the following example of the kind of coercion that §8(a) (4) was designed to alleviate:

In certain plants which now have company-dominated unions, the employees were asked to sign petitions, to be sent to their representatives, opposing this bill. I received personal letters from workers in which they said they had signed these petitions because they knew if they did not do so their jobs would be lost, and that they needed their jobs in order that their families might eat. It is that sort of discrimination which we wish to prevent.

79 Cong. Rec. 7676 (1935) (emphasis supplied).

Coercing employees to sign petitions with which they do not agree is closely analogous to coercing employees to give testimony they believe to be false. The intent of the Act's authors was that workers should not feel compelled by the threat of employer retaliation to misrepresent their own knowledge or beliefs on matters relevant to the Act.

Respondent argues that protecting a refusal to testify will actually dry up channels of information to the Board by encouraging the withholding of evidence. What we are protecting here, however, is not simply a refusal to testify: if that were the only issue, then the union would have subpoenaed Pennacchini, as the Act clearly permits it to do. See 29 U.S.C. § 161(1). Rather, we are protecting employees from pressure to deliver false or misleading information to the Board. Section

8(a) (4) by itself neither encourages nor discourages testimony: it simply leaves employees free to choose their actions before the Board without fear of employer reprisals.⁶

Respondent has maintained throughout the proceedings that Pennacchini was a "managerial" employee, not subject to the protections of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). Pennacchini's job involved preparation of the union newspaper. The union contends that, in that capacity, she exercised such independence of judgment as to identify her with management. The Board expressly adopted the finding of the Administrative Law Judge that Pennacchini was not a managerial employee. 219 NLRB at 1188 n.3.

Our standard of review on this issue is whether the Board's decision has "warrant in the record" and a "reasonable basis in law." *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944). See also K. C. Davis, *Administrative Law of the Seventies* § 30.00 at 691 (1976). We find that standard to be fully met in this case. "Managerial" employees are those "who formulate, determine, and effectuate an employer's policies." *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963), cited with approval in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 n.19 (1974). The determination of an employee's managerial status "depends upon the extent of his discretion, although even the authority to

⁶ This is not to suggest that §8(a) (4) protects improper employee conduct, such as perjury, before the Board. Since there are no allegations of misconduct by Pennacchini in Board proceedings, we are not presented with that question in this case.

exercise considerable discretion does not render an employee managerial where his decision must conform to the employer's established policy." 140 NLRB at 571. According to Pennacchini's credited testimony, she had nothing to do with the policies concerning what should be printed in the union newspaper and never decided what should be included in an article. She would always submit items suggested for publication to the union's chief executive officer for approval, and rarely (if ever) expressed an opinion to him on the substance of the articles she was directed to publish. Her other duties were to proofread collective bargaining agreements, prepare flyers and handbills, construct photographic layouts, and occasionally run the duplicating machine. She did not attend any strategy meetings of union officials.

This evidence provided a sufficient basis upon which the Board could reasonably conclude that Pennacchini did not "formulate, determine, and effectuate" her employer's policies. There is "warrant in the record" to support the premise that her job-related decisions had to "conform to the employer's established policy," and were not the result of her independent judgment. In this regard, this case is distinguishable from *Wichita Eagle & Publishing Co., Inc. v. NLRB*, 480 F.2d 52 (10th Cir. 1973), cert. den., 416 U.S. 982 (1974) where the Court found an editorial writer of a daily newspaper to be a "managerial" employee. The writer in *Wichita Eagle* "could, and did, propose topics for editorials, [and] propound her own viewpoint in an effort to influence editorial policy on various subjects." *Id.* at 55.

Here, there was ample testimony — which the Board found credible⁷ — that Pennacchini neither contributed her own views or proposed editorial topics. Rather, she simply did what she was told.⁸

Respondent also argues that reinstatement is an inappropriate remedy because “there is no position to which Pennacchini can be reinstated.”⁹ This claim is

⁷ The Board adopted the following conclusion of the Administrative Law Judge:

Although [Pennacchini] performed duties that placed her somewhat above the level of other clerical and office employees, the evidence, on balance, convinces me that she was not in the managerial category. As we have seen, she frequently consulted with the executive head of the Union and, while she exercised considerable independence of judgment respecting the specific content of the editorials she wrote on behalf of the head of the Union, they were subject to discussion with her superiors before being composed and published. 219 NLRB at 1193-94.

Respondent suggests that a finding that Pennacchini exercised “considerable independence of judgment respecting the specific content of the editorials she wrote” compels a finding that she was managerial employee. As we interpret the Administrative Law Judge’s decision, and the testimony he credited, Pennacchini’s independence of judgment went only to the form, and not the substance of the editorials.

⁸ In endorsing the findings of the Administrative Law Judge with regard to Pennacchini’s non-managerial status, see note 7, *supra*, the Board also noted that “Pennacchini’s alleged ‘managerial’ status had drastically changed in the months preceding her discharge.” 219 NLRB at 1188 n.3. This “further weaken[ed] the argument that she enjoyed such special status.” *Id.*

⁹ The actual order was that Pennacchini be offered “immediate reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges.” 219 NLRB at 1194. Determination of whether “a substantially equivalent” position is available is ordinarily left to the compliance stage of Board proceedings. See *North Valley Lumber Sales, Inc.*, and *Ralph Allen*, 229 NLRB No. 178 (1977).

without merit. Neither the Board nor the Administrative Law Judge made a specific finding that Pennacchini’s position had been eliminated. Even if there were such a finding, this Court cannot disturb the reinstatement order “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Electric and Power Co. v. NLRB*, 318 U.S. 533, 540 (1943). We see no attempt to evade the purposes of the Act here. Indeed, reinstatement of Pennacchini will effectuate the Act’s goal of protecting employees from unfair labor practices by making them whole after wrongful discharge, and by deterring future violations of the Act. See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 181-82 (1973). To allow an employer to evade a reinstatement order by styling the wrongful discharge of an employee as an “elimination” of her position would deny that employee a meaningful remedy and actually thwart the goals of national labor policy.

The situation here is distinguishable from that in *NLRB v. Schnell Tool & Die Corp.*, 359 F.2d 39 (6th Cir. 1966), where this Court refused to enforce a Board reinstatement order against employers who had sold their businesses subsequent to violating the Act. Issuance of an enforcement decree there would have been a “vain act” because any reinstatement order would have been ineffective against the successor employers, whose liability under the Act had not yet been determined by the Board. Here, the employer against whom enforcement is sought is the same employer found in violation of the Act.

Likewise distinguishable is *Trico Products Corp. v. NLRB*, 489 F.2d 347 (2d Cir. 1974), where the Second Circuit refused to order reinstatement of employees who would have been laid off in any event for economic reasons. Respondent here admits that the Union still publishes a newspaper, albeit through an independent contractor. The fact that an employer may have hired an independent contractor to do the work of a wrongfully discharged employee does not preclude the reinstatement remedy. *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). See also *NLRB v. Jackson Farmers, Inc.*, 457 F.2d 516, 518 (10th Cir. 1972).

Respondent further urges that reinstatement would be improper because of a "basic antagonism" between Pennacchini and the union president (Brown).¹⁰ In an election shortly before Pennacchini's discharge, she openly and vigorously supported Brown's opponent for the union presidency. The union seems to feel that this conduct precludes the possibility of future harmonious relations between Pennacchini and Brown, and that requiring them to work together on production of the union newspaper would create an intolerable situation.

Circuit Courts have on occasion refused to enforce reinstatement orders where the employee involved had shown extreme disloyalty or antagonism toward the employer. In *NLRB v. Bin-Dicator Co.*, 356 F.2d 210 (6th

¹⁰ Respondent attempted to show before the Administrative Law Judge that Pennacchini was guilty of misconduct that might preclude a reinstatement order. The judge considered the chief claim of misconduct and found the evidence to be "inconclusive." 210 NLRB at 1193 n.8.

Cir. 1966), this Court denied reinstatement where the employee had threatened to cause the plant manager to "spend some time in a wheel chair," made threatening gestures at supervisors, and threatened to strike a foreman with a heavy metal casing.¹¹ Likewise, in *NLRB v. National Furniture Mfg. Co.*, 315 F.2d 280, 286-87 n.7 (8th Cir. 1963), the Court refused to order reinstatement where the employee had shown a "disrespectful attitude" toward the employer's general manager, had made damaging statements to at least one customer, and had made derogatory remarks about the personnel manager. And in *NLRB v. Valley Die Cast Corp.*, 303 F.2d 64, 66 (6th Cir. 1962), we denied reinstatement to an employee who with threats prevented maintenance men from entering a company building.¹²

These cases involved acts of employee antagonism far more flagrant than that alleged here. Pennacchini did not threaten union officials and in no way disrupted

¹¹ In *Bin-Dicator*, the Court gave "special examination" to the reinstatement order because the Board order conflicted with that of its trial examiner. 356 F.2d at 215. Here, the Board and its Administrative Law Judge are in complete agreement.

¹² See also *NLRB v. Apico Inns of Calif., Inc.*, 512 F.2d 1171, 1175-76 (9th Cir. 1975), and *Oil, Chemical & Atomic Workers Union v. NLRB*, 547 F.2d 575, 592-93 n. 19 (D.C. Cir. 1976), cert. den., 45 U.S.L.W. 3806 (1977) (both denying reinstatement).

her employer's work. Of course, Pennacchini's prior opposition to Brown's re-election is likely to cause some friction if she resumes her former position. We are, however, bound to give "special respect" to the Board's choice of remedy, based on its judgment as to how effectively to promote the goals of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). As noted by the First Circuit in a similar case, the Board "may have believed that a less complete remedy would leave doubt as to whether the Act fully protected the rights of employees." *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393-94 (1st Cir. 1977). Under these facts, we cannot say that the reinstatement order constituted an abuse of discretion.¹³

We have considered all of Respondent's other arguments and find them to be without merit.

We find that there is substantial evidence to support the Board's findings, accordingly enforcement is GRANTED.

¹³ See *NLRB v. Miller Redwood Co.*, 407 F.2d 1366, 1370 n.2 (9th Cir. 1969), and *NLRB v. Yazoo Elec. Power Assoc.*, 405 F.2d 479, 480 (5th Cir. 1968) (both enforcing reinstatement orders).

DECISION AND ORDER

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

(Retail Store Employees Union, Local 876, et al.
and Anna M. Pennacchini — Case 7-CA-10748)

On February 20, 1975, Administrative Law Judge Ivar H. Peterson issued the attached Decision in this proceeding finding that the Respondent violated Section 8(a) (1) and (4) of the Act. Thereafter, the Respondent filed exceptions and a supporting brief.¹ The General Counsel filed a reply brief to the Respondent's exceptions and brief, and appended thereto his brief to the Administrative Law Judge. Whereupon, the Respondent filed a motion to strike the General Counsel's reply brief, and a supporting brief. In the latter, the Respondent asserts, *inter alia*, that the General Counsel's reply brief raises new issues on which no cross-exceptions were filed. However, a fair reading of the Respondent's own exceptions shows that the issue was raised at least as a defense, and we perceive no material departure from our own rules and regulations, as alleged. Therefore, we find no merit in the Respondent's motion to strike.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

¹ The Respondent also filed a motion requesting oral argument, which we deny because the record and briefs adequately set forth the parties' positions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,² findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The Administrative Law Judge found, and we agree, that the Respondent violated Section 8(a) (1) and (4)

² The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

We also find no merit in the Respondent's exception to the Administrative Law Judge's ruling that Pennacchini's statement, given to a Board agent shortly after she filed charges, be rejected but made a part of the record as a rejected exhibit. The Respondent proffered the statement for purposes of impeaching Pennacchini's testimony, and also as an admission against interest. Finding no discrepancies in the witness' testimony and her affidavit, the Administrative Law Judge rejected the proffer, but preserved the record by receiving the document as a rejected exhibit. While so tentatively ruling on the matter, the Administrative Law Judge gave the Respondent the opportunity to "offer proof testimonially or narratively as he chooses" to dissuade him.

We find it unnecessary either to affirm or reverse the Administrative Law Judge's ruling, since in our view of the case Pennacchini's testimony, where disputed, is not dispositive of our conclusion that Respondent violated Sec. 8(a) (1) of the Act. We find Brown's termination letter to Pennacchini dated November 14, 1973, to reflect clearly that at least a substantial part of Respondent's motivation to discharge Pennacchini was because she did "conveniently 'forget' those facts which you had previously told me about Mrs. Frazier" Accordingly, we find that, regardless of whether the Administrative Law Judge erred in his ruling, Respondent was not prejudiced thereby in the presentation of its defense.

of the Act by discharging Anna Pennacchini³ "because she refused to appear voluntarily as a witness in the unfair labor practice proceeding involving a former fellow employee (Barbara Frazier), on the ground that she had no direct knowledge of the matters about which she was to be questioned." This conclusion is supported by the record, including Pennacchini's credited testimony. Therefore, we find no merit in the Respondent's contention that she was not requested to testify, because such an assertion is contrary to her credited testimony.

In addition, the Respondent asserts that its attorney acted in furtherance of sound professional discretion in not compelling Pennacchini's testimony, and that the instant allegations of 8(a) (1) and (4) misconduct cannot be based upon such a decision. But we do not question counsel's professional judgment any more than we have any reason to believe that counsel played a part in the discharge. Rather, at issue here are the reasons for the discharge given by the Respondent, through its chief executive officer, Horace Brown. Thus, on November 14, 1973, Pennacchini was handed a letter, signed by Brown, stating in part that she was being terminated for her "extraordinary disloyalty" because "you [did] conveniently 'forget' those facts which you had previously told me about Mrs. Frazier, which had in

³ The Administrative Law Judge found that Pennacchini was an employee within the meaning of the Act. We agree for the reasons he stated. Moreover, we note that Pennacchini's alleged "managerial" status had drastically changed in the months preceding her discharge which further weakens the argument that she enjoyed such special status.

part influenced my decision to terminate her." It is abundantly clear that Pennacchini's discharge was motivated, at least in part, by her refusal to cooperate with the Respondent at the October 16 meeting when, in the presence of Brown and the Respondent's counsel, she disclaimed firsthand knowledge of Frazier's alleged shortcomings and indicated further that "I know you would not want me to testify to something I did not personally observe."

Pennacchini may have been wrong in her assessment of the value of her testimony and her competence as a witness. Although her unsigned, unsworn statement, taken by the Respondent in April, tends to support her assertion in this regard, we need not decide that issue. On the other hand, we cannot say she acted with malice. In any event, as the Administrative Law Judge noted, the Respondent could have lawfully tested this assessment and compelled the testimony of this reluctant witness, but it failed to do so. Instead, as an act of reprisal the Respondent discharged her for lack of cooperation. Indeed, as we read the discharge letter and the record in this case, only if Pennacchini were unscrupulous could she have avoided the opprobrium of "extraordinary disloyalty," and the penalty it carried.

In these circumstances, we find that the Respondent violated Section 8(a) (1) and (4) of the Act. The Act protects employees from discrimination because they choose to aid a fellow employee by giving testimony in an unfair labor practice proceeding. See *Local 933, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)*, 193 NLRB 223, 234 (1971). Here we find that this protection also extends to an employee who, without malice, refuses to give testimony, voluntarily, against a fellow employee.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-CIO, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C., Aug. 18, 1975

Betty Southard Murphy, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

DECISION OF ADMINISTRATIVE LAW JUDGE

United States of America
Before the National Labor Relations Board
Division of Judges
Washington, D.C.

(Retail Store Employees Union Local 876, et al.,
Respondent — and Anna M. Pennacchini, An
Individual Charging Party.) Case No. 7-CA-10748

STATEMENT OF THE CASE

IVAR H. PETERSON, Administrative Law Judge: This case was tried before me on 5 days commencing October 3, 1974, and concluding on October 11, in Detroit, Michigan, based upon charges filed by Anna M. Pennacchini, an individual, against Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-CIO, herein called the Union or sometimes the Respondent.

On August 5, the Acting Regional Director for Region 7 issued a complaint and notice of hearing. Briefly stated, the complaint alleged that the Respondent, through its agent Horace Brown, secretary-treasurer, terminated the employment of Mrs. Pennacchini because she assisted a former fellow employee, Barbara Frazier, "to vindicate her statutory rights in an unfair labor practice proceeding . . . and by rendering testimonial evidence to Frazier. . . ." In its answer, dated August 6, the Respondent admitted certain allegations of the complaint but denied that it had engaged in any unfair labor practices.

Upon the basis of the entire record in the case,¹ including my observation of the witnesses as they testified and a careful consideration of the briefs filed by counsel for the Respondent and counsel for the General Counsel on November 21 and December 2, respectively,² I make the following:

FINDINGS OF FACT

I. The Business of the Respondent

The constitution of the International provides that each month the Respondent, and other unions similarly situated, pay to the International in Washington, D.C. a per capita tax on each of the individual member's monthly dues payments received by the Respondent. During the year ending December 31, 1973, the Respondent transmitted in excess of \$100,000 in per capita taxes directly from Detroit, Michigan, to the International. These facts are admitted by the Respondent. I find that the Respondent at all times material has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. The complaint further alleged that Brown, secretary-treasurer, and Thomas Lodico, Sr., president, were supervisors of the Respondent within the meaning of Section 2(11) of the Act, and agents of the

¹ The unopposed motion of counsel for the Respondent that the transcript of record be corrected in certain respects is hereby granted.

² By telegraphic order dated November 20, time for filing briefs was extended to December 2.

Respondent. In its answer, the Respondent denied that Brown was secretary-treasurer and Lodico president, but admitted that Brown was president and Lodico was secretary-treasurer, as in fact was the case. The Respondent also admitted that it terminated Pennacchini on November 14, 1973, but denied that such termination constituted an unfair labor practice.

II. The Alleged Unfair Labor Practices

The Respondent contends that Pennacchini was not an employee within the meaning of the Act and, in its brief, stated that she was terminated because she allegedly assisted a fellow employee, Barbara Frazier, in the latter's efforts, as stated in the complaint, "to vindicate her statutory rights in an unfair labor practice proceeding . . . by rendering testimonial evidence to Frazier in that she told Frazier of the Union's efforts in establishing that Frazier had been discharged for misconduct and she refused to testify at the request of the Union in said unfair labor practice proceeding." In this regard, Respondent's counsel states that the case was initiated by Pennacchini's charge that she had been terminated "in reprisal for her internal political opposition as an employee-member to the Respondent's President." Further, he points out that the case "languished in the Advice Section in Washington pending the Board's decision" in the *Frazier* case.³ He

³ *Retail Store Employees Union, Local No. 876, RCIA, AFL-CIO*, 212 NLRB No. 31 (1974), which, it is contended, "itself was held to be governed by the Board's intervening decision in" *Retail Clerks Union, Local 770, RCIA, AFL-CIO*, 208 NLRB No. 54 (1974). It is asserted that in both of these cases, "the Board repudiated the theory of Advice and of the General Counsel that a charge against a union *qua employer* which alleged discriminatory reprisal by it on account of internal union political activities by member-employees stated a Section 7 right or a Section 8(a) violation."

also calls attention to the fact that, after the decision of the Board in the *Frazier* case, the present proceeding continued to pend in the Advice Section and that, in the meantime, the charging Party amended her charge, near the end of the 6-month limitation period, "not to add what ultimately became the gravamen of this complaint . . . but that, 'A further reason for the discharge was Anna Pennacchini's cooperation with the National Labor Relations Board in the period of time prior to her discharge.'" It is further asserted that, when the complaint eventually issued, it contained allegations of violations of Section 8(a) (1) and (4), "not on any of the grounds asserted by the Charging party either in her original or amended charge, but because Pennacchini had allegedly assisted Barbara Frazier by 'rendering testimonial evidence to Frazier in that she told Frazier of the Union's efforts in establishing that Frazier had been discharged for misconduct' and because Pennacchini 'refused to testify at the request of the Union in said unfair labor practice proceeding.'" Finally, counsel argues that "by the time of and during the trial," counsel for the General Counsel "had abandoned all grounds except that Pennacchini had allegedly been discharged for refusal to testify on behalf of the Union in the *Frazier* case." Counsel asserts that the latter allegation "is patently untrue, incredible, unsupported by the record and unsupportable by law" and that "despite some cosmetics, the General Counsel is apparently still trying this case in disregard of the Board's holdings" in prior cases,⁴ and "that in an action against a union *qua employer*, the rights of the charging party and the responsibilities of the respondent are to be measured as in conventional" proceedings under

⁴ Counsel refers to the two cases cited in footnote 3, *supra*.

Section 8(a) against other employers. Thus, counsel for the Respondent states that he will demonstrate that counsel for the General Counsel has not sustained his actual burden of proof, has failed to state or prove a legal cause of action, and, finally, that a backpay and reinstatement order "would be contrary to law."

Counsel for the General Counsel asserts that the Respondent violated Sections 8(a) (1) and (4) by terminating Pennacchini for refusing to testify regarding certain matters on behalf of the Respondent in an unfair labor practice hearing and that, moreover, the Respondent violated the same sections by discharging Pennacchini "for disclosing certain information to the alleged discriminatee in that unfair labor practice case, which information aided the alleged discriminatee in" her preparation for trial, and that Pennacchini was merely a rank-and-file employee, rather than a managerial employee as contended by the Respondent.

III. Discussion

Pennacchini was originally hired by the Union in 1967. By her own choice, she left on two occasions and began her last period of employment in August, 1969. Her job then was to proofread collective-bargaining agreements, prepare flyers and handbills as well as articles for the Union's newspaper, and, in addition, make photographic layouts for the use of union organizers and representatives. In addition, she occasionally ran the duplicating machine in the office. When she went to work, her immediate supervisor was Hershel Womack, the chief executive officer of the Union, who later was succeeded by Brown. Pennacchini

testified that she had nothing to do with the policies concerning what should go into the paper and that she did not attend any strategy meetings of union officials. In the 1973 campaign for the election of officers of the union, Pennacchini supported her ex-husband, Ray Soncrant, and in that regard she prepared and ran off campaign literature in his behalf. In connection with mailing out the leaflets, Pennacchini utilized a typewriter which she had at her home, that had been purchased and paid for by Soncrant and delivered to her home.

Following the mailing of certain handbills, Lodico called her into his office. He showed her a handbill that related to the question of members voting for dues reduction, and compared it with a piece of copy that she had prepared for another matter and, so she testified, "mentioned that the type was identical and it appeared that it was done on the same machine." She told him that that was not the case. A few days later, toward the end of August, Brown called her into his office; Lodico was present. Brown asked if she would do some work on his campaign but stated that it would be illegal for that to be done at the office and mentioned that perhaps she had equipment at her home. She stated she was not interested. Following that meeting, so Pennacchini testified, matters "changed in the office." She related that she "no longer had any duties to perform," and that when she endeavored to solicit work she was told that the matter would be considered but she was not given any work other than at the request of organizers. About the last week in August when she came to the office her telephone had been disconnected.

Frazier's husband, a former business representative of the Union, was running for office during the 1973 election campaign. Frazier was terminated in about October, 1972. When Frazier's case was about to go to trial, Mary Ellen Tereschco, Brown's personal secretary, told Pennacchini she should prepare for Frazier's hearing; however, Pennacchini stated that she would not be there as she was going on vacation, which had been scheduled on two occasions; however, she did not go on vacation. Brown spoke to Pennacchini about the Frazier case on more than two occasions. In January or February, 1973, some three or four months after Frazier had been terminated in October, 1972, he told her to type up a list of alleged violations committed by Frazier. Pennacchini testified that she had never personally observed any of the alleged violations committed by Frazier but that Brown mentioned that Frazier had had her hair done and went shopping "on company time."

On October 15, Tereschco handed Pennacchini a document informing her that she should appear at the office of counsel for the Respondent at 2 p.m. the following day. She did so and found that Brown and Soncrant were also there. Counsel for the Union handed her the list that she had prepared at Brown's request and asked her, as she testified, "if she was prepared to testify at Barbara Frazier's trial the following day, to substantiate these alleged violations." In response, she said she had "never personally observed any of these." She was not called to testify in the Frazier hearing. When Brown handed Pennacchini her termination letter, dated November 14, Brown told her, after she read the letter, that the Union, as she supposedly knew, had been phasing out her work. She replied that she was not aware of that matter.

Pennacchini testified that she spoke to Frazier on several occasions before October 17, and placed the time as beginning in the latter part of August and until the hearing. She related that Frazier called her at her home and expressed surprise at finding out that someone other than her husband intended to enter the race for president of the Union. According to Pennacchini, Frazier stated that the hearing in her case had been scheduled and that she was sure that Pennacchini would appear against her. To this, Pennacchini replied that she would not appear. She did not do so.

In his brief, counsel for the Respondent ably argues that Pennacchini was a managerial employee and, moreover, that her termination came about because her position was eliminated. He further contends that whether or not Pennacchini was a managerial employee, it is not a violation of the Act to terminate an employee because of his alleged refusal to testify and, in addition, that Pennacchini's unauthorized action in divulging confidences of her employer and its attorney, including the mailing list of the Union, was unprotected under the Act. We will first consider the contention regarding Pennacchini's managerial status.

We have set forth above the essential facts relating to the nature of the work performed by Pennacchini for the Respondent, and it seems unnecessary to repeat these findings. Webster's Third International Dictionary (Unabridged) defines the term "manager" as "one who manages," that is, "a person that conducts, directs, or supervises something" or "a person whose work or profession is the management of a specified thing (as a business, an institution, or a particular phase or activity within a business or institution)." The term

"managerial" is defined as "of, relating to, or characteristic of a manager." Counsel for the Respondent, in his brief (p. 52 *et seq.*) argues that Pennacchini was the de facto editor of the Union's newspaper, was in charge of its publications and public relations generally, and acted as the special representative of Brown. Counsel concedes that the chief executive officer was the titular editor, pursuant to a requirement of the constitution of the International and, as such, was responsible for the formulation of the policies of the Union and its newspaper; however, he argues that "the fact is that the day-to-day operation of the newspaper was by Pennacchini until two or three months before her termination, when Harold DeLong, as editorial consultant became the successor editor, as an independent contractor." Referring to the substantial number of newspaper exhibits placed in the record, counsel argues that the responsibility of the editor was "to implement the Union's policies, to 'mirror the image' of the Union and its officers . . . and to serve as their 'alter ego.'" It is urged that Pennacchini, on rather frequent occasions, would consult with the officers, either individually or together, and that with regard to the content of the newspaper or leaflets, she would be acquainted with confidential information. Conceding that the officers were finally responsible for the content of articles prepared by Pennacchini and approved by them, he points out that she and the officers quite obviously worked closely together in order to assure that the policy of the Union was implemented and that the translation of policy into content was done by Pennacchini alone until the retention of DeLong in 1973, when she shared such responsibilities with him until her responsibilities were eliminated.

Counsel suggests that the contention by counsel for the General Counsel "that Pennacchini was some kind of a 'clerical' whose responsibilities merely involved the taking of photographs is absurd." In this regard, he points out that at the time she was terminated Pennacchini was making approximately \$275 a week and was also receiving a \$50 per week expense allowance, a rate of compensation comparable to that of the remaining "staff" representatives of the newspaper, namely, the business representatives of the Union who also received a weekly expense allowance and who, along with Pennacchini, were required to attend the membership meetings of the Union as a condition of employment. He points out that Pennacchini's pay scale was approximately \$100 above that of hourly-rated employees in the office and clerical bargaining unit represented by Local 10, who worked under a union shop agreement, of which unit Pennacchini had been a member several years earlier. She had withdrawn from that unit when she ceased to be a clerical employee. Counsel also calls attention to the fact that Pennacchini, as a witness in an arbitration case, identified her responsibility as "publications." Counsel contends that it is "an insult to the intelligence of one evaluating this record to suggest that Pennacchini was a menial employee without significant responsibility or authority" or "to suggest she could have fulfilled her responsibility without consultation with the executive officers or without serving the purpose of reflecting their policy viewpoints." (Br. p. 54).

Counsel for the Respondent emphasizes that he makes no claim that Pennacchini was a supervisory employee but that the contention upon which he relies is that "she was an employee so closely identified with management that she could not be regarded as a rank and file employee subject to Section 7 protections." He

points out that all office and clerical employees were required to be members of the bargaining unit represented by the Office Employees Union and that, if Pennacchini had been a clerical employee, she would have been part of that unit. All other employees of the Union were required, as a condition of employment, to be members of the Union which, however, was not their bargaining representative; this was true of business agents and of Pennacchini, who was regarded as a special representative, and of certain maintenance employees. He maintains that prior decisions held that "such required membership as a condition of employment is irrelevant to a charge against a union *qua* employer under the Act."⁵ He also cites the rationale employed by the General Counsel and the

⁵ In addition, he refers to the Board's decision in *Retail Store Employees Union, Local 428*, 163 NLRB 431 (1967), where the Board stated (at pages 423-3):

A union-employer, just as any other employer, may impose on its employees requirements reasonably related to the proper performance of their jobs. Here, for example, a field representative, in conducting the Respondent's business, might be asked to explain how the Respondent functions as a collective-bargaining representative, or why it is desirable for workers to organize. It is clearly proper for the Respondent to be concerned about not hiring employees who do not adequately understand or agree with the Respondent's general goals, as well as its specific methods of operation and ways of achieving its goals to the extent such understanding is necessary for the performance of their duties. We deem it not unreasonable, therefore, for a union-employer normally to require its employees to attend its meetings and fulfill certain other obligations of regular union membership. Indeed, in this sense and because of the undesirability of a *per se* rule in this critical area of labor relations, we believe that a union-employer's requirement that its employee belong to it, pay dues, fees, and assessments to it, and attend its meetings need not, in and of itself, violate the Act.

Advice Section in connection with the termination of Curtis Frazier, a business agent of the Union, and the husband of Barbara Frazier. In that case, the Agency expressed the opinion that a business representative was one "who implemented union policy" and that, in consequence, the union as the employer was "viewed as privileged to remove him from employment in such a position involving, as it did, the carrying out of the Employer's 'management' policy." Subsequently, the Advice Section, in connection with the Barbara Frazier case, summarized the previous memorandum concerning Curtis Frazier as holding that a complaint was not there warranted "based on his refusal to support the newly-elected official, because his position in the Union hierarchy, that a business agent, was considered to be one which effected Union 'management policy,' and from which the Union could demand undivided loyalty." Accordingly, Respondent's counsel states that if, as counsel for the General Counsel in that proceeding conceded with respect to a number of business agents of the Union, namely, that they were involved in the implementation of management policy of the Union and therefore owed undivided loyalty to the Union, it necessarily follows that "the Union can insist upon the same and more from Pennacchini who was involved in confidences which not even the business agents shared, and who quite clearly was the 'alter ego' of the Union's executive officers, expressing herself in their names."

In the view of counsel for the Respondent, a decision of the Court of Appeals for the Tenth Circuit, *Star Eagle Beacon Publishing Co., Inc. v. N.L.R.B.*, 480 F.2d 52 (1973), "emphasizes the validity of these views." There, the Court, in refusing to enforce an order of the Board, held that an editorial writer, who was responsible to an

editorial page editor, who in turn was responsible to the editor and publisher of the newspaper, "was nevertheless an active participant in 'formulating, determining and effectuating' the newspaper's journalistic policies, and therefore [was] a managerial employee." In sum, counsel suggests that without regard to "the label attached to her, Pennacchini was so closely identified with the executive officers and policies of the Union that she owed a responsibility of undivided loyalty, even beyond the loyalty *which may be exacted of any employee*," and that, as a managerial employee or "as one otherwise so closely identified with management, she would not be entitled to Section 7 rights or the beneficiary of Section 8(a) responsibilities."

In a more recent decision involving the issue of managerial employees (*N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, U.S. , 94 S Ct. 1767 (decided April 23, 1974)), the Court made the following observations:

Following the passage of the Taft-Hartley Act, the Board itself adhered to the view that "managerial employees" were outside the Act. In *Denver Dry Goods*, 74 N.L.R.B. 1167, 1175 (1947) assistant buyers, who were required to set good sales records as examples to sales employees, to assist buyers in the selection of merchandise, and to assume the buyer's duties when the latter was not present, were excluded by the Board on the ground that "the interests of these employees are more closely identified with those of management." The Board reiterated this reading of the Act in *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n. 4 (1947):

"The determination of 'managerial,' like the determination of 'supervisory,' is to some extent necessarily a matter of the degree of authority exercised. We have in the past, and before the passage of the recent amendments to the Act, recognized and defined as managerial employees, executives who formulate and effectuate management policies by expressing and making the operative decisions of their employer, and have excluded such managerial employees from bargaining units. We believe this Act, as amended, contemplates the continuance of this practice." (Citations omitted.)

The Board's exclusion of "managerial employees" defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer," has also been approved by courts without exception

In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals, all point unmistakably to the conclusion that "managerial employees" are not covered by the Act. We agree with the Court of Appeals below that the Board "is not now free" to read a new and more strictive meaning into the act. 475 F.2d, at 494.

We turn now to a consideration of the contention of the Respondent that it is not a violation of the Act to terminate an employee because of his alleged refusal to testify. As stated above, on October 16 Pennacchini appeared at the office of counsel for the Respondent as requested. She was there shown a list, which she had prepared in January or February at Brown's request, of alleged violations committed by Frazier. Pennacchini testified that counsel for the Union asked her "if she was prepared to testify at Barbara Frazier's trial the following day, to substantiate these alleged violations." She stated, in response that she had not "personally observed any of these." She was not called to testify and, so far as appears, she was not subpoenaed to appear at the Frazier hearing.⁶ Counsel for the General Counsel argues that Pennacchini's refusal to testify was privileged under the Act inasmuch as she "had the right not to testify in a manner that she thought to be false." He urges that since Section 8(a) (4) "seeks to protect the integrity and efficacy of the Board's processes, it appears to the General Counsel that an

⁶ Pennacchini testified that when she was called into the office of counsel for the Union, he asked her "if I was prepared to testify at Barbara Frazier's trial, the following day, to substantiate these alleged violations. And I said I never personally observed any of these." Upon further inquiry by counsel, Pennacchini related that she again said she had not observed the incidents contained on the list and stated that "I know you would not want me to testify to something I did not personally observe."

employee's refusal to testify falsely must be as much protected as the act of testifying."⁷

Attorney Sachs, counsel for the Respondent, testified that he interviewed Pennacchini and other employees of the Union on April 6, 1973, in regard to the Frazier case which was then scheduled to be heard on or about April 25. In addition, on that occasion, he had a private interview with Pennacchini. He testified that Pennacchini referred to the fact that her office was situated at a point where she could observe pedestrian traffic going by her office and that she observed that various of the checkers, including Frazier, would come to staff meetings in the afternoon in clothes different from those they had worn in the morning, from which, she concluded, that they had gone home on work time in order to change clothes. In addition, he related that Pennacchini told him that Frazier and other checkers had kept hairdresser appointments on work time and that she had informed Brown of reports made to her, of which she did not have personal knowledge, prior to the time Frazier was terminated. Sachs further related

⁷ In support thereof, he cites *Commerce Concrete Company, Inc.*, 197 NLRB 658 (1972), in which the Trial Examiner rejected a contention that the alleged discriminatee was not protected by Section 8(a) (4) because he "did not actually testify or otherwise adversely affect Respondent." In this regard, the Trial Examiner concluded that Section 8(a) (4) protects employees "against discrimination for giving information informally in connection with a representation proceeding. While the record does not show what Smith [the alleged discriminatee] actually did in connection with the representation proceeding beyond appearing in response to a subpoena and sitting with counsel," he previously had found that the Respondent "suspected that he gave the Union or the Board information helpful to the Union's position and adverse to Respondent's, and that that was the reason Respondent discriminated against" him.

that he requested Pennacchini and each of the other persons interviewed on April 6 to prepare a statement concerning those matters of which they had knowledge. He received such a statement from Pennacchini, which substantially confirms his testimony given in the present proceeding. The hearing in the Frazier case did not, in fact, begin until mid-October. Shortly before the hearing Sachs again interviewed Pennacchini in the presence of Brown and Soncrant. He related that he questioned her about the matters that they had gone over in the April meeting, and stated that Pennacchini told him "that she really hadn't been referring to Barbara Frazier, she was referring to various of the other checkers" concerning hairdresser appointments and the like. With regard to alleged conversations she had had with Brown prior to Frazier's termination, in particular about the list she had made, she responded "that she really was without personal knowledge, or that I had misunderstood what she had previously told me. Or that she had only heard hearsay, or that I was confused and she was talking about other people, or she made reference to other checkers and so on." Neither Pennacchini nor Soncrant was called to testify in the Frazier case. Sachs testified that he dealt with Pennacchini "from time to time . . . as editor of their newspaper in connection with the public relations work for the union, including the preparation of organizing leaflets, campaign material, communications to members, those whom the union sought to be organized; and generally these would relate to her consulting with me for my legal judgment and counsel with respect to proposed materials."

As a witness for the Respondent, Brown testified that until the present proceeding he had no information or report of what Barbara Frazier said to Pennacchini or

what Pennacchini said to Frazier concerning the Barbara Frazier case. He further related that after Pennacchini was terminated the physical space that she had used previously was taken over by the legal secretary and the department was completely eliminated. He also testified that he had frequent occasion to talk to Pennacchini about her preparation of the union newspaper and that she "generally counseled with me on the preparation of his [Womack's] editorial." He further testified that Pennacchini prepared articles "entirely on her own, without counseling with any of the executive officers", and that on many occasions Pennacchini would sit in with himself and other executive officers when an organizational campaign was in preparation in order to aid her in composing handbills and other organizational literature. He also testified that on a number of occasions he discussed with Pennacchini the confidentiality of the union's mailing list.⁸ Brown denied that he told Pennacchini to make up a list of items that would reflect misconduct on the part of Frazier although he understood that she had made up such a list because she had shown it to him.

⁸ There was considerable evidence produced regarding the preparation, access to and alleged use of the mailing list for unauthorized purposes. This matter is not dealt with to any substantial extent in the briefs. I have considered it but am of the view that it is somewhat inconclusive and in any case would not alter the conclusions I reach.

CONCLUSIONS

With regard to the contention that Pennacchini was a managerial employee, I am persuaded and find that she was not. Although she performed duties that placed her somewhat above the level of other clerical and office employees, the evidence, on balance, convinces me that she was not in the managerial category. As we have seen, she frequently consulted with the executive head of the Union and, while she exercised considerable independence of judgment respecting the specific content of the editorials she wrote on behalf of the head of the Union, they were subject to discussion with her superiors before being composed and published.

Nor do I believe that Pennacchini gave false testimony, as suggested in the brief of counsel for the Respondent. I have attempted carefully to weigh the testimony of all witnesses and, from my observation of them as they testified and a study of the record, I come to the conclusion that Pennacchini was an essentially truthful witness. She appeared to pay close attention to questions put to her and carefully but readily answered. Accordingly, I conclude and find that the Respondent terminated Pennacchini because she refused to appear voluntarily as a witness in the unfair labor practice proceeding involving a former fellow employee, on the ground that she had no direct knowledge of the matters about which she was to be questioned; her presence at the hearing moreover, was not sought to be compelled

by subpoena. In these circumstances, I conclude that her right not to appear was protected by the Act. Accordingly, I find that the Respondent violated Section 8(a) (4) and (1) by discharging her.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent, Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-CIO, is an employer and a labor organization within the meaning of Section 2(2), (5) and (6) of the Act.
2. By discharging Anna M. Pennacchini on November 14, 1973, the Respondent violated Section 8(a) (4) and (1) of the Act.
3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III above, occurring in connection with the operations of the Respondent as described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that the Respondent engaged in unfair labor practices in violation of Section 8(a) (1) and (4) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It will be recommended that the Respondent offer Anna M. Pennacchini immediate and full reinstatement to her former position, and if not available, to an equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, by payment to her of a sum of money equal to that which she would have earned from the date of her discharge to the date of the offer of reinstatement, consistent with Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest on backpay to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in these proceedings and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:⁹

⁹ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-CIO, its officers, agents, successors and assigns, shall:

1. Cease and desist from discharging or otherwise discriminating against any employee for testifying or, absent testimonial compulsion, refusing to testify in any proceeding before the Board, or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Anna M. Pennacchini immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges.

(b) Make Anna M. Pennacchini whole for any loss of earnings she may have suffered by reason of Respondent's unlawful discrimination against her in the manner set forth in the section of this decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, reports and all other records necessary to analyze the amounts of backpay due under the terms of this recommended Order.

10 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226. Telephone (313) 226-3244.

No. 77-1407

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In the Supreme Court of the United States

OCTOBER TERM, 1977

**RETAIL STORE EMPLOYEES UNION, LOCAL 876,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO, PETITIONER**

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

**JOHN S. IRVING,
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**WADE H. MCCREY, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1447

RETAIL STORE EMPLOYEES UNION, LOCAL 876,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 570 F.2d 586. The decision and order of the National Labor Relations Board (Pet. App. 17a-45a) are reported at 219 NLRB 1188.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1978. The petition for a writ of certiorari was filed on April 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Section 8(a)(4) of the National Labor Relations Act by discharging an employee because she refused to testify to matters of which she had no personal knowledge in an unfair labor practice proceeding involving a former fellow employee.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) is set forth at Pet. 3.

STATEMENT

1. The Board found that petitioner violated Section 8(a)(4) and (1) of the Act, 29 U.S.C. 158(a)(4) and (1), by discharging employee Anna Pennacchini in the following circumstances:

Early in 1973, the Board's General Counsel issued a complaint charging that petitioner had unlawfully discharged employee Barbara Frazier. In preparing its defense, petitioner's president, Horace Brown, ordered Pennacchini to draw up a list of Frazier's

alleged transgressions, which were based on "[d]ifferent rumors that [Brown] had heard" about Frazier (Pet. App. 28a; A. 123-125).¹ Thereafter both Brown and Union Secretary-Treasurer Lodico gave Pennacchini additional items to add to the list (A. 140, 144-145). Pennacchini compiled the list, although she had not actually witnessed the alleged incidents (Pet. App. 28a; A. 123).

The Board hearing in the Frazier case was scheduled to begin on October 17, 1973. On October 16, Pennacchini and Brown attended an afternoon meeting at the offices of petitioner's attorney. The attorney handed Pennacchini the list which she had made and asked her if she was "prepared to testify at Barbara Frazier's trial * * * to substantiate these alleged violations." Pennacchini responded that she had "never personally observed" any of the alleged incidents and further told counsel, "I know you would not want me to testify to something I did not personally observe." Pennacchini was not called to testify at the Frazier trial, and was not subpoenaed to appear. (Pet. App. 20a, 28a, 36a; A. 126, 153.)

On November 14, a month after Pennacchini's statement, Brown discharged her, accusing her of "extraordinary disloyalty" and of "conveniently 'forget[ting]'" alleged facts on the prepared list (Pet. App. 3a-4a, 19a-20a).

¹ "A." references are to the printed appendix filed in the court of appeals. A copy is lodged with this Court.

2. The Administrative Law Judge, whose decision was upheld by the Board, found that Pennacchini was discharged because she declined, on the basis of lack of personal knowledge, to give testimony "to substantiate [the] alleged violations" committed by Frazier contained on the list she had prepared for Brown (Pet. App. 36a, 40a, 18a). The Board found that in so doing petitioner violated Section 8(a)(1) and (4) of the Act (Pet. App. 20a, 40a-41a), and ordered petitioner to reinstate Pennacchini to her former position (Pet. App. 42a).

The court of appeals agreed with the Board that Pennacchini's discharge violated Section 8(a)(4) of the Act.² The court noted (Pet. App. 5a) that Pennacchini "was asked by the union if she would testify in support of certain allegations against Frazier and she refused." She "was fired because she would not testify in support of the union's position at the Frazier unfair labor practice proceeding" (Pet. App. 5a-6a). It added: "What we are protecting here * * * is not simply a refusal to testify * * *. Rather, we are protecting employees from pressure to deliver false or misleading information to the Board" (Pet. App. 9a).

The court of appeals noted that, in *National Labor Relations Board v. Scrivener*, 405 U.S. 117, 122, this Court had stated that Congress intended Section 8

² The court found it unnecessary to "review the Board's finding with respect to § 8(a)(1)" (Pet. App. 1a, n. 1).

(a)(4) "to afford broad rather than narrow protection to the employee," and that the "protection [of Section 8(a)(4)] was] needed to preserve the integrity of the Board process in its entirety." *Id.* at 124. The court of appeals here concluded (Pet. App. 8a; footnote omitted):

We think that the "integrity of the Board process in its entirety" would be seriously undercut if employers were allowed to freely discharge employees who because of lack of knowledge refuse to testify in support of the employer position at an unfair labor practice hearing. Employees might well feel compelled to offer misleading statements to the Board if they knew they could be fired for showing reticence in coming forward with testimony favorable to the management side. Fair adjudication of disputes requires that witnesses be free from excessive external pressures to manufacture or withhold particular evidence.

ARGUMENT

The decision of the court of appeals is correct. It is consistent with the decisions of this Court and does not conflict with the decision of any other circuit.

Section 8(a)(4) of the Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." Petitioner argues that the discharge of Pennacchini did not violate that Section because Pennacchini did not file charges or give testimony. This contention is

inconsistent with *National Labor Relations Board v. Scrivener, supra*. There the court of appeals rejected the Board's finding of a Section 8(a)(4) violation where employees had been discharged for meeting with and giving evidence to a Board investigator, on the ground that that section could not "be extended to cover preliminary preparations for giving testimony." 435 F.2d 1296 (C.A. 8). This Court unanimously reversed, recognizing that, while Section 8(a)(4) "could be read strictly and confined in its reach to formal charges and formal testimony," it could "also be read more broadly." 405 U.S. at 122. Noting the necessity for avoiding "employer intimidation of prospective complainants and witnesses," the Court concluded that Congress intended "to afford broad rather than narrow protection to the employee." *Ibid*.

The decision below is correct if Section 8(a)(4) is "to afford broad rather than narrow protection" to Pennacchini. As shown above, the Board, upheld by the court of appeals, found that Pennacchini's discharge was caused by her refusal to testify to events she had not witnessed. Pointing out that this Court stated in *Scrivener, supra*, 405 U.S. at 122, that it was necessary for employees to have "complete freedom" to speak truthfully to the Board "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses," the court of appeals correctly concluded that "[s]imilar considerations militate in favor of extending statutory protection to the activity

involved in this case" (Pet. App. 7a). Petitioner's attempt to distinguish *Scrivener* on the ground that Pennacchini never spoke to Board representatives (Pet. 8) is thus unconvincing. As the court recognized, had Pennacchini

acquiesced in [petitioner's] request that she testify against Frazier, she could very well have perjured herself before the Board. The result would have been more serious than a closing of "channels of information" to the Board. It would have been the outright misleading of the Board. Coercing employees to give untrue testimony just as surely undermines the integrity of Board proceedings as does coercing employees to give no testimony at all. [Pet. App. 7a.]

Nor is there merit in petitioner's contention that the court of appeals' holding allows an employee to refuse an employer's request to testify in a Board proceeding, thereby impeding an employer's ability to present evidence (Pet. 9-12). As the court of appeals recognized (Pet. App. 9a-10a), the employer may subpoena a reluctant employee. Petitioner's failure to subpoena Pennacchini belies its claim that it was denied the opportunity to present evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

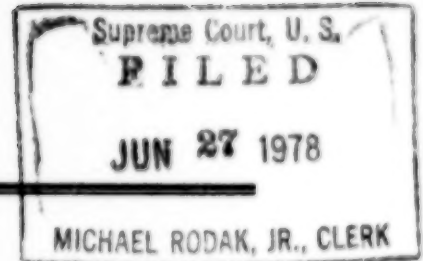
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JUNE 1978.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1447

RETAIL STORE EMPLOYEES UNION, LOCAL 876,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER

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Respondent.**

REPLY BRIEF OF PETITIONER

The Labor Board's brief in opposition assiduously declines to explain how a statutory provision which forbids discrimination against an employee only "because he has filed charges or given testimony under" the Act, §8(a)(4), 29 USC §158(a)(4), can apply where the employee concededly has done neither.

The Board unresponsively argues that it is important that it not be misled by hearing allegedly dubious testimony (Brief in Opposition, 5). Evidently, the rationale of this Court in treating pre-hearing statements in fact given to Board agents as "testimony" for purposes of §8(a)(4)—to keep "channels of information" open to the Board, *NLRB v Scrivener*, 405 US 117, 122 (1972)—is to be rejected by the Board when it prefers not to listen.

Unless §8(a)(4) and similar legislation (see Petition, 6-7) mean one thing for the Labor Board and for other federal agencies, and something else for respondent employers, the Court should grant the Petition and reverse the decision below.

Respectfully submitted,
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June, 1978